Supreme Court, U. S.
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NO. 75-225

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

ROY C. WILLIAMS,
Plaintiff-Petitioner

v.

BRASEA INC. and VESSEL CIAPESC I,
Her engines, etc., *Defendant-Petitioner*

BENDER WELDING & MACHINE COMPANY, INC.,
Defendant-Respondent

CONSTRUCTION MACHINERY COMPANY,
Defendant-Respondent.

PETITION OF BRASEA, INC. AND VESSEL CIAPESC I FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Brasea, Inc., seeks certiorari to review the judgment of the Court of Appeals for the Fifth Circuit, and, in support of its Petition respectfully shows:

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas, Corpus Christi Division,

is unreported and is printed as Appendix "A" to this Petition and the District Court's Amended Final Decree is printed as Appendix "B". The Opinion of the Court of Appeals dated July 5, 1974 is reported at 497 F.2d 67 (5th Cir. 1974) and is printed as Appendix "C" hereto. The subsequent Opinion of the Court of Appeals upon Petitions for Rehearing dated May 23, 1975, is reported at 513 F.2d 301 (5th Cir. 1975) and is printed as Appendix "D".

The judgment sought to be reviewed from the Court of Appeals was originally entered on July 5, 1974, and thereafter modified upon Petition for Rehearing by Opinion dated May 23, 1975.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The following questions presented by this petition are of national importance to the uniformity and harmony of the maritime law and the law of products liability as related thereto. The impact of the holding of the Court of Appeals, if allowed to stand, will have far reaching effect on the standard of care and responsibility owed by builders and suppliers of commercial fishing vessels to the users of their products. The following specific questions demonstrate the error on the part of the Court of Appeals in reaching an inequitable and unsupportable result:

1. Is a vessel owner entitled to indemnity from a manufacturer of a defective and unreasonably

dangerous product when such product provided by the manufacturer to the vessel owner causes injury to one of the vessel owner's employees?

2. Is it permissible for the Court of Appeals to set aside Findings of Fact made by the District Court and substitute its judgment therefor absent a determination that the District Court's Findings of Fact are "clearly erroneous" as required by Federal Rules of Civil Procedure 52(a)?

STATEMENT OF THE CASE

Plaintiff, Roy Lewis C. Williams, [hereinafter Williams] instituted this action against the Fishing Vessel CIAPESC I, *in rem*, and her owner, Brasea, Inc., *in personam*, to recover damages under the Jones Act (Title 46, U.S.C. §688) and the general maritime law for personal injuries sustained aboard the Fishing Vessel CIAPESC I on December 10, 1969.[1]

By amended complaints Williams joined Bender Welding & Machine Co., Inc. [hereinafter Bender] and Construction Machinery Company [hereinafter CMC] as parties defendant to the litigation. Cross Actions for indemnity were thereafter filed by Brasea against Bender and CMC and Bender, in turn, cross acted against CMC for indemnity.

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1. The Fishing Vessel CIAPESC I was arrested at Brownsville, Texas on process issued in accordance with Williams' Original Complaint. Subsequent thereto, Brasea filed with the Brownsville Division of the United States District Court of the Southern District of Texas, its Petition for Exoneration from or Limitation of Liability and in accordance with orders duly issued by that Court, the vessel was released from seizure upon posting of a limitation fund in the amount of $90,000. Brasea's limitation of liability proceeding is still pending awaiting the outcome of this litigation.

After trial the District Court sitting in admiralty entered its opinion of April 24, 1972 (Appendix "A"). On June 2, 1972, the District Court entered its amended final decree (Appendix "B") finding each defendant primarily liable for 33-1/3% of the total damage award of $316,500.00, which award had been reduced by 40% for plaintiff's contributory negligence. The Cross Actions for indemnity filed by Brasea and Bender were denied.

The Court of Appeals reversed the District Court's findings of strict liability in tort as to Bender and CMC; reversed the District Court's finding that the Plaintiff's contributory negligence was a proximate cause of the Plaintiff's injury; reversed the District Court's finding that crewmember Edward Terry was negligent as such finding was clearly erroneous; affirmed the District Court's denial of all indemnity claims; and remanded the case to the District Court for a factual finding as to whether the Plaintiff, Williams, ordered crewmember Terry to engage the winch cathead.

REASONS FOR GRANTING THE WRIT

I.

Brasea's Right to Indemnity

The District Court specifically found that Bender and CMC provided the Vessel CIAPESC I with equipment which was "unreasonably dangerous", "defective" and "not reasonably suited for the purpose for which it was intended" and it further specifically found:

> "The faults of Bender and CMC, as heretofore outlined, are the same faults which caused Defendant, Brasea, Inc., to afford to Plaintiff an unseaworthy vessel." (Appendix "A", p. 30).

The Court of Appeals reversed, upon Motion for Rehearing, the District Court's finding of vessel unseaworthiness on the grounds that their appellate exoneration of Bender and CMC "eliminates any basis for holding CIAPESC I liable in rem." (Appendix "D", p. 62). If the Court of Appeals' exoneration of Bender and CMC is correct, then Petitioner accepts the Court of Appeals' above quoted exoneration of the CIAPESC I. However, in the event Plaintiff prevails on its Petition for Writ of Certiorari in connection with its contentions as to Bender and CMC, then it follows as a matter of law that this Petitioner is entitled to indemnity either on the basis of the hereinafter discussed *Ryan* doctrine or on the basis of a manufacturer's strict liability in tort.

The Court of Appeals concluded in a terse seven sentence paragraph that the principles of indemnity set forth in *Ryan Stevedore Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) were inapposite to the present case because:

1. "Most importantly, the stevedore in *Ryan* was found negligent."

2. "*Ryan* was limited to a situation of contract breach, but no such obligation existed here." (Appendix "C", p. 49.)[2]

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2. Aside from the universally recognized manufacturer's implied warranty of the fitness of its manufactured product which no longer requires privity of contract, there is no question regarding the contractual relationship between Brasea and Bender covering the building and purchase of the CIAPESC I. During the trial it was stipulated that Bender entered into a written contract to build said vessel, including installing the winch, and Brasea was a third party beneficiary to the contractual relationship between Bender and CMC for the furnishing of the winch.

Petitioner submits that the Court of Appeals misapprehended the fundamental basis for this Court's historic decision in *Ryan* and committed error, as a matter of law, when it concluded that the principles enunciated in *Ryan* were inapposite to the facts of this case. That there is a serious and obvious conflict between the Court of Appeals' opinion and this Court's prior opinion cannot be seriously questioned.

This Court in *Ryan* clearly posited the established right to indemnification on behalf of the vessel owner upon the well recognized manufacturer's warranty of its product in the following language:

> "It is petitioner's (stevedore's) warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product." 350 U.S. at 133-134 (Parenthetical expression added).

In characterizing the shipowner's right to indemnification for the stevedore's breach of its "warranty of workmanlike performance", this Court in *Ryan* concluded:

> "It is a simple action to recover, under a voluntary and self-sufficient contract, a sum measured by foreseeable damages occasioned to the shipowner by the injury or death of a longshoreman on its ship.
>
> *A like result occurs where a shipowner sues, for breach of warranty, a supplier of defective ship's gear that has caused injury or death to a longshoreman using it in the course of his employment on shipboard.*" 350 U.S. at 130 (Emphasis supplied).

This Court had occasion to review these principles in *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964) wherein it pointed out:

> ". . . the absence of negligence on the part of a stevedore who furnishes defective equipment is not fatal to the shipowner's claim of indemnity based on the stevedore's implied warranty of workmanlike service." 376 U.S. at 318.

If there was any doubt remaining after this Court's decision in *Ryan* that a vessel owner in the position of Brasea is entitled to predicate its indemnity action upon non-negligent contractual and warranty principles, such doubt was dispelled by the following statement from this Court's decision in *Oregon Stevedoring*:

> "This undertaking is the stevedore's 'warranty of workmanlike service that is comparable to a manufacturer's warranty of the soundness of its manufactured product,' a warranty generally deemed to cover defects not attributable to a manufacturer's negligence." 376 U.S. at 318-319 (Citations omitted).

Additionally, *Oregon Stevedoring* would characterize the obligations owed by Bender and CMC to Brasea as follows:

> "The implied warranty to supply reasonably safe equipment may be satisfied with less than absolutely perfect equipment; however, the issue of breach of the undertaking does not turn on whether the contractor knew or should have known his equipment was safe, but on whether the equipment was in fact safe and fit for its intended use." 376 U.S. at 321-322 (Footnote omitted).

The vessel owner in *Oregon Stevedoring* was found liable for personal injuries sustained by a longshoreman caused by defective equipment supplied by the stevedore. In granting the vessel owner indemnity for breach of warranty by the stevedore, notwithstanding the fact that the stevedore was not negligent, this Court concluded:

> "Where the shipowner is liable to the employees of the stevedore company *as well as its employees* for failing to supply a vessel and equipment free of defects, *regardless of negligence,* we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment supplied by a stevedore in furtherance of its contractual obligations." 376 U.S. at 324 (Emphasis supplied).

There can be little doubt that the court below fundamentally misconceived the basic legal principles involved and whether categorized as a breach of warranty of workmanlike service or breach of warranty of the soundness of its manufactured product, the fundamental principles of indemnity established by this Court in *Ryan* and *Oregon Stevedoring* clearly demonstrate that such principles are fully applicable to this case irrespective of whether Bender and CMC were cast in liability based on a negligent or non-negligent breach of their manufacturers' warranty. Accordingly, Petitioner respectfully submits that based upon the District Court's Findings of Fact, which the Court of Appeals has *not* found to be "clearly erroneous", the vessel owner, Brasea, is entitled to full indemnity from Bender and CMC whether predicated upon breach of implied warranty of the soundness of their manufactured products or upon strict liability in tort.

II.

Improper Standard of Review Applied by Court of Appeals

a.

As to Plaintiff's Contributory Negligence

The Court of Appeals' reversal of the Trial Court's finding of fact that the plaintiff's contributory negligence was a producing, proximate cause of the plaintiff's injuries is in direct contravention of the mandate of the Federal Rules of Civil Procedure and the decisions of this Court governing appellate review.

It is readily apparent from a review of the court of appeals' initial opinion (Appendix "C") that the court's review of the District Court's Findings of Fact as to Williams' contributory negligence did not follow the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure. The Court of Appeals correctly recognized that this Court's decision in *McAllister v. United States,* 348 U.S. 19 (1954) limits the appellate court's review of the trial court's findings on questions of negligence and causation to the strict "clearly erroneous" standard, but failed to apply this recognized standard when considering the contributory negligence of the Plaintiff. In passing upon the Trial Court's fact findings in regards to the alleged negligence of crewmember Terry the Court of Appeals correctly observed:

> "On the subject of Terry's negligence, we review the record mindful that factual determinations are to be overturned only if clearly erroneous. F. R. Civ. P. 52(a). *McAllister v. United States,* 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20". Appendix "C", p. 42.

The command of F. R. Civ. P. 52(a) is clear:

> ". . . Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witnesses . . ."

While this Court's decision in *McAllister, supra,* is the case most often cited by federal appellate courts as limiting appellate review to the "clearly erroneous" standard in passing upon fact findings of a trial court, this Court's more recent decision in *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. 100 (1969) serves to even further emphasize, for those who doubted, the precise limitation of appellate review when it stated:

> "In applying the clearly erroneous standard to the findings of a District Court sitting without a jury, Appellate Courts must constantly have in mind that their function is not to decide factual issues *de novo.* The authority of an Appellate Court, when reviewing the findings of a Judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the Trier of the Fact, who is usually in a superior position to appraise and weigh the evidence." 395 U.S. at 123.

Notwithstanding the explicit command of F. R. Civ. P. 52(a) and the mandate of this Court in *McAllister, supra,* the Court of Appeals has in the present case exercised *de novo* review of factual issues in overturning and reversing specific findings entered by the trial court without any attempt to apply the "clearly erroneous" standard of review. In so doing, the Court of Appeals has gone into clear and complete conflict with the Courts of Appeals for the Third, Fourth, Seventh, Eighth and Ninth Circuits.

Kommanvittselskapet Harwi (R. Wigand) v. United States, 467 F.2d 456 (3d Cir. 1972), cert. denied 411 U.S. 931 (1973); *Maryland Shipbuilding & Drydock Company v. Baker-Whitney Towing Co.,* 395 F.2d 746 (4th Cir. 1968); *In Re O. L. Schmidt Barge Lines, Inc.,* 475 F.2d 428, 430-431 (7th Cir.) cert. denied sub nom. *Moss v. O'Donnell,* 414 U.S. 828 (1973); *Lindsay v. McDonnell Douglas Aircraft Corporation,* 485 F.2d 1288 (8th Cir. 1973); *United States v. Standard Oil Company of California,* 495 U.S. 911, 916 (9th Cir. 1974).

In its Memorandum and Order of April 24, 1972, (Appendix "A", pp. 28-29) the District Court made the following Findings of Fact:

> "All of the Defendants have some responsibility in this regard, but so does the Plaintiff. He took the hard way, a dangerous way, in trying to untangle the rope at a time when a crewmember was close to the rod which had only to be pushed in to start the power and thus turn the cathead, and he should have known better. He disregarded the existing danger, when, if careful, he could have avoided being caught by the tangled rope, when the rod was pushed in."

The Court of Appeals held that the use of a crowbar or Stillson wrench may have been a practical, viable, and safer option under the circumstances for Plaintiff to use to untangle the rope from the cathead and deferred to the judgment of the District Court in holding that the District Court's findings as to Plaintiff's contributory negligence were not clearly erroneous. Appendix "C", p. 45. However, notwithstanding its recognition and proper application of F. R. Civ. P. 52(a) in affirming the District Court's finding that the Plaintiff was contributorily negligent, the Court of Appeals in its opinion of July 5,

1974, proceeds to wholly disregard the District Court's implied finding that the Plaintiff's contributory negligence was a *producing, proximate cause* of his injuries, and substituted its own "finding" on proximate cause. Ignoring the essential basis for the District Court's finding of fact regarding the Plaintiff's contributory negligence and proximate cause, the Court of Appeals directs the District Court to "conclude" that the Plaintiff's negligence, as initially found by the District Court, was not a contributing, proximate cause of his injuries should it on remand determine that crewmember Terry was not acting under the Plaintiff's orders in activating the winch. (Appendix "C", p. 46)

It is shocking for the Court of Appeals to "conclude" that the action of crewmember Terry in failing "to make a reasonable effort to be sure Williams was free from danger . . ." was *not negligent* (Appendix "C", p. 42) (specifically finding that the District Court's finding of fact in this regard was clearly erroneous, without additional findings) and then proceed to "conclude" that crewmember Terry's actions in engaging the winch constituted intervening, unforeseeable *negligence* depriving the Plaintiff's contributory negligence in taking a "dangerous way in trying to untangle the rope . . ." of proximate causation with respect to his injury. (Appendix "C" p. 46) Even more shocking is the appellate court's total departure from the "clearly erroneous" standard of review in directing the District Court on remand to "conclude" that the Plaintiff's negligence was not a contributing, proximate cause of his injury if it should find that crewmember Terry was not acting under the Plaintiff's orders to activate the winch cathead when the District Court has specifically found as a fact that whether the Plaintiff ordered the

power to the winch cathead engaged or not, Plaintiff's contributory negligence was a proximate, producing cause of his injuries. (Appendix "A" p. 29).

The Court of Appeals in the case at bar has violated its judicial duty by engaging in *de novo* review of the trial court's Findings of Fact, and has violated, in addition to the mandate of this court, the mandate of its own previous decisions. In *Horton & Horton, Inc. v. T/S J. E. DYER,* 428 F.2d 1131 (5th Cir. 1970), the Fifth Circuit Court of Appeals made the following pertinent observation:

> "Questions of negligence, unseaworthiness and proximate cause are to be determined by the trier of fact and as such are subject to the clearly erroneous rule." 428 F.2d at 1135 (citations omitted).

Moreover, the Court of Appeals in *Horton & Horton, supra,* specifically delineated the law on the doctrine of superseding, intervening, unforeseeable negligence as follows:

> "Moreover, in determining causation in maritime matters, the applicability of such doctrines as last clear chance and the *interruption of negligence by a subsequent intervening negligence* is questionable. '(T)he Maritime Court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party.' Gilmore & Black, the Law of Admiralty, P. 404 (1957)." 428 F.2d at 1135.

The appellate court's *de novo* review of the trial court's Findings of Fact concerning the Plaintiff's contributory negligence and causation is likewise out of harmony with

the Fifth Circuit Court of Appeals' previous decision in *Watz v. Zapata Off-Shore Company,* 431 F.2d 100 (5th Cir. 1970), wherein the Court stated:

> "It is not always necessary, however, to find intervening conduct specifically foreseeable. Courts have held tortfeasors (Plaintiff) responsible when their conduct (untangling rope on cathead) threatened a particular sort of result (hands caught in cathead started) and an unanticipated force (Terry) intervenes to produce that result." (Parenthetical expressions added) 431 F.2d at 116.[3]

Without doubt, the appellate court's reversal of the District Court's fact findings that Plaintiff's contributory negligence was a proximate, producing cause of his injuries without determining that the District Court's findings were "clearly erroneous" constitutes impermissible *de novo* review of the District Court's Findings of Fact in direct contravention of F. R. Civ. P. 52(a), the decisions of this Court in *McAllister, supra,* and *Zenith Radio Corp., supra.*

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3. In a Footnote reference to its opinion, the Court in *Watz* cited the following language from the Restatement (Second) of Torts §442B (1965):

> "Where the negligent conduct of the actor creates or increases the risk of a particular harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.
>
> Comment b, at p. 470:
>
> This is to say that any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always 'proximate', no matter how it is brought about, except where there is * * * intentionally tortious or criminal intervention, and it is not within the scope of the risk created by the original negligent conduct." 431 F.2d at 117, n. 19.

b.

As to the Responsibility of Bender and CMC

The Court of Appeals reversed the District Court's Findings of Fact that the winch and associated equipment supplied by CMC and installed by Bender were defective and unreasonably dangerous and were proximate, producing causes of the Plaintiff's injuries thereby casting Bender and CDM strictly liable in tort.

In so doing, the Court of Appeals declined to consider the applicability of incorporating products liability law into general maritime law on the basis that only one appellate court has passed judgment on the issue. Appendix "C", p. 54. Contrary to the Court of Appeals' statement, products liability law or strict liability in tort, though possibly a relative newcomer to the general maritime law, has in fact a firm foundation in the maritime field commencing at least as far back as *Sieracki v. Seas Shipping Co.*, 149 F.2d 98 (3rd Sir. 1945), *aff'd*, 328 U.S. 85 (1946). Additionally, the Sixth, Seventh and Eighth Circuit Courts of Appeals have specifically approved the incorporation. *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631 (8th Cir. 1972); *Schaffer v. Michigan-Ohio Navigation Company*, 416 F.2d 217 (6th Cir. 1969); *McKee v. Brunswick Corp.*, 354 F.2d 577 (7th Cir. 1965)[4]. Any indication by the Court of Appeals below that there may be some question as to the incorpora-

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4. *Stretch v. Associated Container Transport, Ltd.*, 388 F. Supp. 935 (C.D. Cal. 1975); *Sears, Roebuck & Co. v. American President Lines, Ltd.*, 345 F. Supp. 395 (N.D. Cal. 1971); *In Re Alamo Chemical Transportation Co.*, 320 F. Supp. 631 (S.D. Tex. 1970); *Montgomery v. Goodyear Tire & Rubber Co.*, 231 F. Supp. 447 (S.D.N.Y. 1964); *Middleton v. United Aircraft Corp.*, 204 F. Supp. 856 (S.D.N.Y. 1960).

tion of products liability law into general maritime law is in direct conflict with the prior decisions of this Court and of the appellate opinions cited above.

Again departing from its judicial function of limited appellate review under the "clearly erroneous" standard, the Court of Appeals concluded that the winch and associated equipment manufactured by CMC and installed by Bender were neither unreasonably dangerous nor producing causes of the Plaintiff's injuries by its findings that the activation of the winch was an intervening, superseding cause of Plaintiff's injuries. (Appendix "C", p. 56).

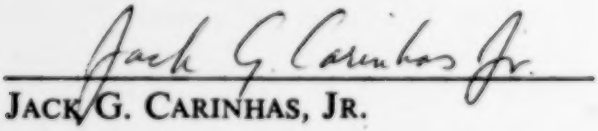
Petitioner will not here burden the Court with a lengthy and detailed analysis of the appellate court's opinion reversing the trial court's Findings of Fact imposing liability on Bender and CMC; suffice it to say that the trial court's findings that the winch and associated equipment manufactured by CMC and installed by Bender were defective and unreasonably dangerous and a proximate, producing cause of the Plaintiff's injuries are well supported in the record. What has previously been said with respect to the rationale of *Horton & Horton, supra,* and *Watz, supra,* is as applicable to Bender and CMC as it is to Williams. In overturning the District Court's finding of liability as to Bender and CMC, the appellate court makes no attempt whatsoever to juxtapose these findings against the "clearly erroneous" standard but impermissibly substitutes its judgment therefor.

CONCLUSION

This petition calls for authoritative clarification and settlement by this Court of the questions presented and

for correction of the injustices permitted by the errors of the Court of Appeals. It is respectfully submitted that certiorari should be granted.

Respectfully submitted,



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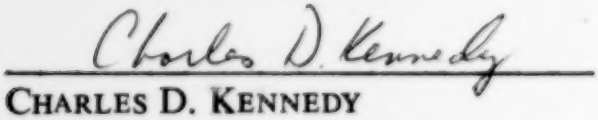

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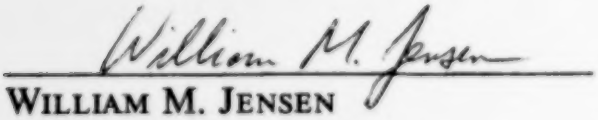

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I certify that the foregoing Petition for Writ of Certiorari has been served upon Watkins & Hamilton, 443 The Main Building, Houston, Texas 77002, attorneys for Bender Welding & Machine Co., Inc.; M. W. Meredith, P. O. Box 2768, Corpus Christi, Texas 78403, attorney for Construction Machinery Company; Law Offices of William R. Edwards, 400 Wilson Tower, Corpus Christi, Texas 78403 and Cleveland & Shaaber, Barnett First National Bank Building, Jacksonville, Florida 32202, attorneys for Plaintiff.

_____

Of Royston, Rayzor, Cook & Vickery

APPENDIX A

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION NO. 69—C—213

Admiralty or Maritime Claim Within
the Meaning of Rule 9(h)

ROY LEWIS C. WILLIAMS

v.

BRASEA, INC., ETC., ET AL

(Filed April 24, 1972)

MEMORANDUM AND ORDER

The Plaintiff Williams, captain of the CIAPESC I, a fishing vessel, was injured while the vessel was fishing in the Gulf off the Texas coast. His injuries were very disabling. Both his arms were broken so severely that his left arm was amputated at the shoulder and the right arm just below the elbow.

The CIAPESC I was built by Defendant Bender Welding and Machine Company (sometimes called Bender) and was sold to Defendant Brasea, Inc., in the ordinary course of Bender's business. In constructing the vessel, Bender had installed a winch, of which the port cathead was a component part. This winch, designated as Model Sx-3r, was designed and manufactured by Defendant Construction Machinery Company (sometimes referred to as CMC) and sold directly to Bender. Bender also installed on the vessel the engine and power takeoff equipment which operated the winch, constructed a snatch-block frame which was above the winch, but Bender did not rig the vessel. There was installed a rod with a handle on it, as part of the engine and power takeoff equipment. To use the handle, one of the crewmen had to stand on a low platform in front of the winch and between the catheads and reach over the catheads and above the winch. The rod was pushed in to activate the winch and pulled out to cut it off. No substantial change had occurred or modifications made in said winch, the port cathead, or the machinery related to the operation of the cathead, or in the snatch-block frame from the date of the delivery of the vessel to Brasea until the time Plaintiff suffered said injuries.

This case was tried without a jury and the Court's problem is to determine what caused the injury and, if parties other than the Plaintiff were at fault, how much money is the Plaintiff entitled to recover.

The winch was in operation immediately prior to the incident causing Plaintiff's injuries. It was being used to pull in the nets, and the line, a rope about one inch in diameter, became tangled on the port cathead. The

power was turned off and the cathead had stopped moving when Captain Williams commenced trying to untangle the line. Plaintiff was using both hands to work with the line when the power came on and the cathead commenced to turn. Plaintiff's hands became entangled in the line and, although the power was immediately shut off, the cathead continued to turn for several revolutions and Plaintiff was flipped around until it stopped.

The acts above mentioned are uncontradicted. The Court, in determining what caused the injury, must resolve the conflicts existing as to other facts. Terry, a deckhand on the CIAPESC I, testified that Williams told him to turn on the power and he followed this instruction by reaching over and pushing in the rod. Williams denies giving such instruction and Rico, another deckhand, did not hear it. Terry testified he thought Williams was in the clear when the motor started, but there is no convincing proof that Terry made any reasonable effort to be sure. In any event, there is little doubt that Terry started the engine. He was standing between the catheads, just a couple of feet from Plaintiff, and knew he was trying to untangle the line with his hands. Whether Plaintiff told him to do so or not, when Terry turned on the power without making a reasonable effort to be sure Plaintiff was clear of danger, he was negligent, and thus the Defendant Brasea, Inc., was actively at fault. As soon as he realized Williams' hands were caught, Terry shut off the power, but the cathead continued to turn. If the power had not come on, Williams probably would still be fishing today. This negligence was a proximate cause of Plaintiff's injuries.

But, such negligence was not necessarily the only cause of the injury. Rope lines being hauled aboard shrimp

vessels, generally via a cathead, will sometimes tangle, and experienced seamen are aware of this. The fact that the rope tangled and Plaintiff was injured is not in itself enough to warrant a finding of strict liability or of negligence on the part of any of the Defendants. *Helene Curtis Industries, Inc. v. Pruitt,* 385 F.2d 841. So, the Court must determine what caused the rope to tangle in the first place. In determining this fault, if any, in the cathead, Plaintiff's Exhibits 13, 14 and 16, and the testimony directly related thereto, will be disregarded.

Since the rope tangled on the port cathead, we will start with it. Was there a fault in the configuration of the cathead which was responsible for the tangling of the rope, thus starting the chain of events resulting eventually in Plaintiff's injuries? There is ample evidence that the cathead and the other equipment on the vessel had been reasonably well maintained and kept in good repair. Except for normal deterioration, the cathead was in the same condition as when manufactured and installed on the vessel.

Counsel has furnished the Court with a transcript of the testimony of witness Koloc, with references to page and line of certain portions of such testimony. The Court appreciated this courtesy and it was very helpful. However, the testimony regarding the slant of the inside of the flange and the reduction of the radius of the curve as it merges into the throat of the spool from two inches to one-half inch, and the imperceptible taper of the spool, consisted of many speculative questions and answers, and the various exhibits in evidence did not remove the speculation. The Court concludes that Plaintiff failed to prove the cathead was not reasonably suited for the purposes for which it was intended. Even if there was suffi-

cient evidence to make a prima facie case, which the Court doubts, it was not convincing. Even if there was "guesswork" involved in manufacturing, and the configuration of the finished product was different than shown on the drawings, this would be pertinent only after the Court was satisfied the configuration was faulty. The presumption of adverse testimony, if applicable at all, was not strong enough to overcome the weakness of the Plaintiff's case as to this issue.

The Plaintiff also complains that CMC designed the winch without providing a braking mechanism to stop the revolving cathead when an emergency such as existed here arises. There was no uncertainty in the evidence as to this. It is undisputed that the port cathead on the winch will continue to revolve several times after the power to the winch is cut off, and that, if the rope becomes tangled, further revolutions of the cathead would increase and tighten the tangle. It is also undisputed that the injuries to Plaintiff were greatly aggravated by the continued revolving of the cathead after Plaintiff's hands were caught in the rope. And, there is no reason why an adequate braking mechanism for the cathead could not be provided. It seems to the Court, under the circumstances in this case, if there had been proper application of a braking mechanism on the port cathead, the tangle might have been easily disentangled and Plaintiff might not have been injured, but there is no way to tell for sure about that. The evidence does indicate that the additional turns of the cathead, after the first or perhaps even after the second, were responsible for Plaintiff's loss of both arms, and the Court is satisfied that, if the cathead had been stopped after the first or second turn, Plaintiff's injuries would not have been so severe.

Therefore, the Court finds that the failure on the part of CMC to provide an adequate braking mechanism for the port cathead rendered the same defective and unreasonably dangerous to persons situated as was Plaintiff, and, therefore, it was not reasonably suited for the purpose for which it was intended; and, further, that the absence of an adequate brake was a producing cause of injuries to Plaintiff.

The Defendant Bender Welding and Machine Co., Inc., in the construction of the vessel CIAPESC I, installed the winch and also provided a snatch-block frame above the winch. Plaintiff contends the snatch-block frame did not provide a fair lead from the snatch block to the port cathead. "Fair lead" refers to the angle at which a rope line runs from the snatch block to the cathead. This angle is determined by the relationship of the snatch-block frame and the throat of the cathead. The rope line used in pulling in the nets runs up through the rigging and down to the snatch-block frame and through the snatch block, and from there to the port cathead. The evidence proved, to the satisfaction of the Court, that the snatch-block frame was too far forward and thus there was not a fair lead from the snatch block to the port cathead. The improperly located snatch-block frame and the resulting absence of a fair lead caused the line to tangle on the port cathead. Also, the winch was installed so that it slanted down toward the stern of CIAPESC I, which may have contributed to the lack of a fair lead. Therefore, the Court finds the placement of the snatch-block frame by Bender was such as to make the vessel, and particularly the area in front of and near the winch, unreasonably dangerous to uses thereof, and thus it was not reasonably suited for the purpose for which it was intended;

and such installation was a producing cause of the incident in which Plaintiff was seriously injured.

There was some testimony with regard to a shackle between the snatch-block frame and the snatch block, but the evidence was uncertain with regard to this and it did not establish to the satisfaction of the Court that the shackle did any more than contribute to the fair-lead problem, if it did anything, and its presence does not change the findings of the Court with regard to the lack of a fair lead from the snatch-block frame down to the port cathead on the winch. The Court finds the fair-lead problem would have been the same without the shackle. However, this is a matter of unseaworthiness which will be discussed later.

With regard to the negligence of both Construction Machinery Company and Bender Welding and Machine Co., Inc., the Court is not satisfied that the evidence charges either Defendant with any negligent fault which was the proximate cause of Plaintiff's injuries. Under the theory of strict liability, a defective condition created by a Defendant which was a producing cause of an injury is sufficient. *C.A. Hoover and Son v. O. M. Franklin Serum Company,* 444 S.W.2d 596 (1969); and *Putman v. Erie City Manufacturing Company,* 338 F.2d 911 (5 Cir., 1964). This is not so as to negligence.

It was established that winches powered as the one here involved do not usually have separate braking mechanisms on the catheads, particularly on shrimping vessels, and that there is no proof in the record of any history of serious injuries resulting from the absence of such braking mechanism. There was a lack of convincing proof that the braking system was needed under any circumstances other than those which occurred in this case.

There is no negligence on the part of CMC unless it failed to use ordinary care in the design and manufacture of the winch and cathead. Cain v. George, 411 F.2d 572 (5 Cir., 1969). The Court finds CMC did not fail to use ordinary care in designing and manufacturing said winch without a separate brake on the port cathead.

Bender Welding and Machine Co., Inc., was not negligent in installing the winch purchased from CMC in CIAPESC I, nor in the placing of the snatch-block frame where it did. Although it was not properly placed and thus subjected Bender to strict liability, when the activities of Bender are measured against ordinary care, the evidence is not convincing that it was negligent; thus, the Court finds Defendant Bender was not negligent in placing the snatch-block frame as it did in the construction of the vessel.

The foregoing findings and conclusions of the Court relate to the liability of Defendants Bender and CMC to Plaintiff. We have already found the negligence of seaman Terry in turning on the power was active negligence for which Defendant Brasea, Inc., is responsible. Defendant Brasea, Inc., has other liability in this case. The snatch-block frame was improperly placed and Defendant Brasea, Inc., did not make proper use of shackles to remedy this defect. The port cathead had no independent braking mechanism. The rod used to turn on the power to the winch and turn it off was over the winch and not easy to reach. Consequently, at the time the rope line bringing in the nets was tangled on the port cathead, the vessel, and particularly the area in front of the winch, was not reasonably suitable for its intended use and thus unseaworthy. *Gibbs v. Kiesel,* 382 F.2d 917 (5 Cir., 1967).

Now that the responsibility of the several Defendants has been determined, The Court must now resolve the amount of the money damages resulting from Plaintiff's injuries. Maintenance and cure are not here involved, but loss of wages, loss of physical capacity other than earning a living, and pain and mental anguish are certainly serious problems.

At the time of the trial, the Plaintiff's physical wounds had healed, but he had not yet learned how to use any prothesis. The evidence established his work-life expectancy at twenty-six years, and his actual life expectancy at thirty years. He is a person with a limited sixth-grade education and has spent most of his life as a seaman, working mainly on shrimp boats. He has been serving as a captain of a shrimp boat for some time. It is customary in the shrimping industry that the captain and his crew are paid based on a percentage of the haul, so the Plaintiff's income would naturally vary from year to year. There was some conflict in the testimony with regard to the income of the Plaintiff, and there is no way to figure it accurately, but considering what information the Court has, it finds that from the time of the injury to the time of trial, the Plaintiff lost wages of $10,500.00; and the amount of money, if paid now, which will compensate him for his loss of earnings in the future is $142,500.00.

In determining the amount necessary to compensate him for his physical incapacity from the date of the injury to the time of trial, we must take into account that he was taken care of at no expense to him for a considerable time after the injury. The Court finds this amount to be $5,000.00; and, in determining the amount of money necessary to compensate him for his future

physical incapacity, other than wages, we must take into account the cost of the assistance he will need. Of course, it is possible that he may be able to develop the ability to use artificial limbs, but the use of such prothesis will be exceedingly limited. The Court finds the amount of money, if paid now, which will compensate Plaintiff for his future physical incapacity for the remainder of his life is $109,500.00.

The physical pain and suffering which the Plaintiff underwent at the time of the accident and subsequent thereto until his wounds healed must have been severe, and the mental anguish which he suffered as a result of such injuries up to the time of trial must have been extreme. There is no indication Plaintiff will suffer physical pain to any great extent in the future, but he will, for the rest of his life, be limited in his ability to take care of himself. The proof indicates that by diligence Plaintiff could manipulate artificial devices to the extent of taking care of a number of common personal chores, and thus relieve him of some anxiety. Nevertheless, and taking into account a reasonably proficient use of artificial limbs, the mental anguish incident to living like that must be tremendous. To know what physical pain and this sort of mental anguish is worth in dollars and cents is exceedingly difficult; there is no accurate way to measure it. The Court finds that the damages for physical pain and mental anguish suffered by Plaintiff to time of trial to be $135,000.00; and the physical pain and mental anguish which will be suffered by Plaintiff in the future and for the rest of his life to be $125,000.00.

The Court has recognized the severity of Plaintiff's injuries. The total damages suffered by Plaintiff because of his injuries are $527,500.00. All of the Defendants

have some responsibility in this regard, but so does the Plaintiff. He took the hard way, a dangerous way, in trying to untangle the rope at a time when a crew member was close to the rod which had only to be pushed in to start the power and thus turn the cathead, and he should have known better. He disregarded the existing danger, when, if careful, he could have avoided being caught by the tangled rope, when the rod was pushed in. The Court is not prepared to find that Plaintiff gave Terry specific instructions to turn on the power, but, in any event, the Court finds that Plaintiff disregarded existing danger and that his own fault contributed forty percent (40%) to his injuries. The question of whether this Court may reduce Plaintiff's recovery by deduction of the percentage of his fault has been raised. Nevertheless, the Court has taken Plaintiff's fault into account, and thus, his recovery is the sum of $316,500.00.

In considering if Plaintiff's fault should be taken into account, which is, in effect, apply comparative negligence, the Court considered the case of *Texsun Feed Yards, Inc. v. Ralston Purina Co.*, 447 F.2d 660 (5 Cir., 1971). It involved a cause of action arising within the State of Texas, and it holds that, under the facts related in the opinion, contributory negligence will not defeat recovery in a suit based upon a theory of products liability, even though negligence of the defendant is also claimed in the same suit; and, that the contributory negligence of the Plaintiff was not related to the actions of the Defendant. *Texsun Feed Yards* was a civil diversity action totally unrelated to admiralty and the decision was based on the law of products liability in Texas. This Court does not consider it as authority for denying the Defendants here the reasonable protection of the rule of comparative negligence.

This Court is here concerned with an admiralty suit brought under Rule 9(h). The Plaintiff, as in *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406, 409-411, "was injured on navigable waters while working on a ship * * *. Consequently, the basis of [his] action is a martime tort * * *." Thus Federal maritime law is controlling and the rule of comparative negligence should apply. While in *Pope & Talbot* the Supreme Court was concerned with the repudiation of contributory negligence as a complete bar to a plaintiff's recovery in an admiralty case, the reasoning of the Court in that case is certainly applicable here.

Further, since the liability of the ship owner for breach of warranty of seaworthiness is analogous to the liability of a manufacturer or seller for the breach of warrant for fitness, *Grigsby v. Coastal Marine Service of Texas, Inc.,* 412 F.2d 1011 (5 Cir., 1969), the refusal to apply comparative negligence to all phases of this case would create a most confusing situation. The faults of Bender and CMC, as heretofore outlined, are the same faults which caused Defendant Brasea, Inc., to afford to Plaintiff an unseaworthy vessel. To put it another way, all Defendants are at fault for the same reasons, and certainly, in admiralty, and if the facts justify it, comparative negligence is properly an offset to any damages Plaintiff suffered because of the unseaworthiness of the vessel, and so it should be as to the products liability claim pursued by Plaintiff herein.

The final matter for decision concerns claims for indemnity. Although all of the Defendants are jointly and severally liable to the Plaintiff, each Defendant is asking for indemnity from another Defendant. The Court must

finally resolve this issue between the Defendants, as prayed for in their respective cross-actions.

On an active-passive tort theory of indemnity, Defendant Construction Machinery Company and Defendant Bender Welding and Machine Company, which are only passive participants by virtue of their strict liability in tort, may very well have a claim over against Defendant Brasea, Inc., the owner of the vessel, due to the active negligence of Terry, the employee of Brasea, in starting the winch engine before making a reasonable effort to see that Plaintiff was clear of the cathead. *Tri-State Oil Tool Industry, Inc. v. Delta Marine Drill. Co.,* 410 F.2d 178 (1969).

On the other hand, Brasea, Inc., may very well be entitled to recover over against Bender, based upon a contractual indemnity theory arising from Bender's failure to provide a snatch-block frame reasonably suitable for its intended use, *Grigsby v. Coastal Marine Service of Texas, Inc.,* supra, and against CMC, because of its implied warranty of the fitness of the port cathead for the use intended which CMC breached when it failed to provide adequate braking facilities. *Grigsby, Id.*

This Court has been furnished with excellent briefs by all counsel, but, even so, the Court concludes there is little maritime authority to help solve the dilemma pointed up by the alternatives just discussed. However, *South Austin Drive-In Theatre v. Thomison,* 421 S.W.2d 933, writ ref., n.r.e. (1967), is sufficiently analogous to warrant our consideration of the reasoning in the opinion.

In that case, a manufacturer breached its duty to design a power mower reasonably suited for the purpose intended. The operator of the mower, who was the em-

ployee of the defendant seeking indemnity from the manufacturer, negligently reversed the mower and thereby caused injury to the plaintiff. Faced with cross-actions for indemnity, the Texas court held:

> "We believe that the negligence of . . . [defendant-employer] . . . places the [defendant-employer] *in pari delicto* with [the defendant-manufacturer]. Since the [defendant-employer] and [defendant-manufacturer] were concurrent or joint tortfeasors, having no relation to one another, each of them owing the same duty to [plaintiff], and involved in an accident in which the injury occurred without breach of duty to each other, no right of indemnity exists on behalf of either against the other." Id., at 949.

The Court is satisfied that the reasoning of the Texas court will produce a just result as to Defendants before this Court and concludes that CMC and Bender together were *in pari delicto* with Brasea. Also, the Court believes that CMC and Bender were *in pari delicto* with each other. The final result of all the various actions for indemnity is a stalemate. No indemnity will be awarded as between any of the three Defendants.

The foregoing constitutes the findings of fact and the conclusions of law of the Court in this case. The Clerk shall furnish all counsel with copies of this memorandum and order. The Court will prepare its own judgment herein.

Signed this 24th day of April, 1972.

OWEN D. COX
United States District Judge

APPENDIX B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CIVIL ACTION NO. 69-C-213

ROY LEWIS C. WILLIAMS

V.

BRASEA, INC., ET AL

Admiralty or Maritime Claim Within the
Meaning of Rule 9(h)

(Filed June 5, 1972)

AMENDED FINAL DECREE

This cause was tried before the Court, with all parties present and represented by counsel, and the Court made its findings of fact and conclusions of law, and same were incorporated in its Memorandum and Order filed on the 24th day of April, 1972. Pursuant to said findings of fact

and conclusions of law, it is hereby ORDERED, ADJUDGED and DECREED by the Court,

(1) That Plaintiff, Roy C. Lewis Williams, do have and recover of and from the Defendants, Brasea, Inc., Bender Welding and Machine Company, and Construction Machinery Company, the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00):

(A) Defendant Brasea, Inc., shall be primarily liable for 33⅓% of the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00), i.e., One Hundred Five Thousand Five Hundred Dollars ($105,500.00), and secondarily liable to Plaintiff Williams for the sum of Two Hundred Eleven Thousand Dollars ($211,000.00);

(B) Defendant Bender Welding and Machine Company shall be primarily liable for 33⅓% of the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00), i.e., One Hundred Five Thousand Five Hundred Dollars ($105,500.00), and secondarily liable to Plaintiff Williams for the sum of Two Hundred Eleven Thousand Dollars ($211,000.00); and

(C) Defendant Construction Machinery Company shall be primarily liable for 33⅓% of the sum of Three Hundred Sixteen Thousand Five Hundred Dollars ($316,500.00), i.e., One Hundred Five Thousand Five Hundred Dollars ($105,500.00), and secondarily liable to Plaintiff Williams for the sum of Two Hundred Eleven Thousand Dollars ($211,000.00).

(2) That Brasea, Inc., as a cross-plaintiff, take nothing by its cross-action herein for indemnity from and against cross-defendants Bender Welding and Machine Company and Construction Machinery Company;

(3) That Defendant Bender Welding and Machine Company, as cross-plaintiff, take nothing by its cross-action herein for indemnity from and against cross-defendant Construction Machinery Company;

(4) That Defendant Construction Machinery Company, as cross-plaintiff, take nothing by its cross-action for indemnity from and against cross-Defendant Bender Welding and Machine Company;

(5) That Plaintiff shall have his costs of action; and

(6) That Plaintiff shall have interest on this judgment at the rate of six percent (6%) per annum from April 24, 1972, until paid.

Signed this 2nd day of June, 1972.

OWEN D. COX
United States District Judge

APPENDIX C

ROY C. WILLIAMS,
Plaintiff-Appellant-Cross Appellee,

v.

BRASEA, INC., and VESSEL CIAPESC I, her engines, etc., Defendants-Appellees-Cross Appellant,

Bender Welding & Machine Co., Inc.,
Defendant-Appellee-Cross Appellant,

Construction Machinery Company, Defendant-Appellee-Cross Appellant.

No. 72-3623.

United States Court of Appeals,
Fifth Circuit.

July 5, 1974.

Appeal from the United States District Court for the Southern District of Texas.

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The shrimp trawler CIAPESC I, out of Freeport, Texas was trawling for shrimp in the Gulf of Mexico, when the events leading to this involved lawsuit took place. Roy C. Williams, the plaintiff below and appellant (and cross-appellee) here, was master of the CIAPESC I at the time

he was seriously injured aboard the vessel. Williams prevailed below in this action against the owner of the vessel, Brasea, Inc. (Brasea), its builder Bender Welding and Machine Company, Inc. (Bender), and the designer- manufacturer Construction Machinery Company (CMC), of the winch assembly involved in the accident. As to Brasea the action was premised upon unseaworthiness of the CIAPESC I and negligence under the Jones Act, Title 46, U.S.C. Sec. 688. Bender and CMC were sued on theories of negligence and products liability. Brasea cross-claimed for a right of indemnity as against Bender and CMC, and Bender cross-claimed for indemnity from CMC.

The several claims and cross-claims were tried together to the district court without a jury. Final judgment was entered for Williams in the sum of $316,500, which was reduced from a finding of damages in the amount of $527,500, by 40% ($211,000.00), the proportion of damages the court found to represent Williams' contributory negligence. Liability was found as to Brasea based on the negligence of employee Terry, a crewman aboard the vessel, and unseaworthiness of the CIAPESC I. Bender and CMC were found liable on the theory of products liability set forth in the Restatement of Torts 2d, Sec. 402A. Both Bender and CMC were further found not to have been negligent, and both cross-claims for indemnity were denied. By amendment to the final judgment, the liability found was changed from joint and several against the defendants to primary-secondary. Williams gave timely notice of appeal and all defendants filed cross-appeals. After review of the briefs, record, and argument we remand for further findings in connection with the negligence issues and reverse on the issue of products liability.

I. FACTS

On December 10, 1969, the CIAPESC I was trawling for shrimp in the Gulf of Mexico off the Texas coast. Aboard were Williams, master of the vessel, and two crewmen, Edward Terry and Jeremiah Richo. The accident involved a power winch designed and manufactured by CMC and installed by Bender during the ship's construction. The winch had three drums which revolved when power was supplied to the winch. Two machined steel winch heads, called "catheads", were attached to and extended from the drums. Catheads resemble large empty spools perhaps a foot high and of somewhat smaller diameter. Their function largely is to assist in pulling "whiplines", a whipline being a line attached to a shrimp net and run thence through a block and tackle down to the deck of the ship from the A-frame boom which supports it. By wrapping the loose end of the whipline around the cathead and engaging the power, a crewman uses the rotation of the cathead to pull the net alongside the vessel and from there out of the water and up to the deck.

There were two catheads on board the CIAPESC I. A push-pull handle for engaging the power to the winch, and thus the catheads, was located between the two. A low platform on which to stand in front of the handle facilitated reaching it. On the day in question, with both port and starboard nets out, in the 25-fathom area, they hit a "bad bottom" and Williams, the master, ordered the crew to pick up the nets. As the port net was being retrieved the whipline running from the net through the snatch block to and around the cathead became tangled around the cathead. Terry cut the power to the cathead and Williams, who had been below, came on deck to see

what had happened. Recognizing the problem, he instructed Terry to pull on the line in order to create some slack. Williams then began untangling the line around the cathead with his hands.

From all the testimony it appears that, at this precise moment, Terry was standing on the platform in front of the on-off power handle, between the two catheads. Williams was on the other side of the cathead on which the line was tangled, perhaps two feet away. Richo was about six feet away, but was not watching Terry or Williams. A factual dispute exists with respect to what immediately ensued. Terry testified that Williams ordered him to cut on the power of the winch and he did so. Williams denied giving any such order. Richo did not hear anything, but that fact is by no means conclusive, because he was not paying attention and because extraneous noises existed at the time.

When the power came on the cathead began to turn and the line quickly became taut. Williams' left hand caught in the line on the cathead and he yelled for Terry to cut the power. The cathead continued to turn for three or four revolutions after the power was cut, as do all catheads mounted on winches that lack a brake. While trying to free himself, Williams caught his right hand in the line on the cathead and this arm was pulled further into it. He was cut loose after having been carried over the cathead several times thus entangled. The resulting injuries required the amputation of both of Williams' arms. There was further conflict in the evidence as to who actually turned the power off and whether it was before or after Richo freed Williams by cutting the line. Terry further testified that he looked at Williams just before he

was ordered to turn on the power and, while he could not see his hands, he seemed to be in the clear.

II. APPEAL BY WILLIAMS

Williams appeals from several aspects of the court's final judgment. Most significant is his attack on the 40% reduction of the judgment because of his asserted contributory negligence. He first urges that he was not in fact contributorily negligent, and second that, even if he were, the court made no factual findings to support its 40% comparative negligence figure. In our view the question of Williams' contributory negligence *vel non* is inextricably tied to the issue of (a) Terry's, and (b) hence Brasea's[1] negligence. We deal first therefore with the competing negligence claims of Williams and Brasea.

The district court's memorandum-opinion and order contains two references to the dispute as to whether Williams ordered Terry to engage the power and its relevance to liability. The court initially stated that "[w]hether plaintiff told him to do so or not, when Terry turned on the power without making a reasonable effort to be sure plaintiff was clear of danger, he was negligent, . . ." App. at 1746. Later in its opinion the court observed that "[t]he Court is not prepared to find that Plaintiff gave Terry specific instructions to turn on the power, . . ." App. at 1758. The lower court clearly reasoned that Terry was negligent in turning on the power *even if* he was ordered by Williams to do so.

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1. While there may have been room for question at the time of trial as to whether Terry was an employee of Brasea for purposes of the latter's vicarious liability, that issue is now settled adversely to Brasea. See Bishop v. United States, 5 Cir. 1973, 476 F.2d 977.

Williams' contributory negligence was put on a different footing. There was testimony regarding alternative methods Williams might have used in an effort to untangle the line around the cathead, such as prying it loose with a Stillson wrench or simply cutting it with a knife. This was perhaps the basis of the district judge's 40% comparative negligence figure, since in his reference to the reduction he stated that "(h)e took the hard way, a dangerous way, in trying to untangle the rope . . . (h)e disregarded the existing danger, when, if careful, he could have avoided being caught by the tangled rope, when the rod was pushed in". App. at 1757.

We determine that the present findings of fact in the record will not support the trial court's legal conclusions as to negligence and contributory negligence, and accordingly remand for further factual determination consistent with the following discussion.

As noted above, the trial court declined to find whether or not Williams instructed Terry to engage the power. Williams asserts that the burden of proof on that issue rested with Brasea by reason of its allegation that Williams gave the order in support of its contributory negligence claim. From there Williams argues that, since the court made no finding, and the burden of proof was on Brasea, a failure to carry that burden below means that we must assume on appeal that the order was not given. We find that argument imaginative but unavailing. The fact that the court did not make a factual finding is the functional equivalent of not passing on whether the burden of proof was carried—not a premise from which to infer that the burden was not carried. Specifically, the district court held that Terry was negligent even if the order

was given; thus that it was unnecessary to resolve the factual dispute.

On the subject of Terry's negligence, we review the record mindful that factual determinations are to be overturned only if clearly erroneous. F.R.Civ.P. 52(a). McAllister v. United States, 1954, 348 U.S. 19, 75 S.Ct. 6, 99 L.Ed. 20. This court has consistently interpreted that rule to mean that a finding of fact should not be reversed if supported by substantial evidence. Lentz v. Metropolitan Life Ins. Co., 5 Cir. 1970, 428 F.2d 36. We reiterate that the lower court concluded that Terry was negligent because he failed to make a reasonable effort to be sure that Williams was free from danger when he cut the power on *even if* Williams had ordered him to cut it on. We consider that conclusion clearly erroneous in the absence of an additional finding that Terry acted *without* a direct order.

Brasea's brief accurately demonstrates the fallacy in this finding of the lower court. The real question is whether Terry was negligent, *assuming* Williams gave the disputed order. Terry and Williams were but two feet apart, and Terry testified he observed that Williams appeared to be in the clear just as he reached for the power lever. Williams' hands were not visible to Terry, since his vision was blocked by the cathead itself. Thus, in order to exercise the level of care found lacking by the district court, Terry would have had to descend the platform, walk to the side of the cathead to observe Williams' hands, then return to the platform in order to cut on the power; and all this coming *after* receipt of a direct order from Williams to turn the power on.

While we entertain some doubt as to whether this would be negligence as between two crewmen (a question we

need not consider), we have no doubt that it was not such as between the master of a vessel and a crewman. A seaman's duty to obey orders from his immediate superior overrides the postulate that the seaman must delay execution of the order until he makes a reasonable effort to be sure that following the order will not injure the superior who gave the order. On this reasoning we determine that the district court's conclusion was clearly erroneous and based on a false legal premise. Indeed, a seaman may not be contributorily negligent for carrying out orders that result in his own injury, even if he recognizes possible danger. Darlington v. National Bulk Carriers, 2 Cir. 1946, 157 F.2d 817. Terry's conduct reflects less in the way of culpability than did that of the seaman in *Darlington,* and we perceive no valid reason for holding him to a higher standard of care.

It needs emphasis here that our contrary determination on this point flows directly from the necessary assumption that Williams gave the order to turn on the power. If that assumption is dispelled upon remand by a factual determination adverse to Brasea that no such order was given, it may follow that Terry was in fact negligent. Our present holding is simply that such a finding cannot stand in the face of an assumption that Williams ordered him to turn on the power.

The clearly erroneous talisman of Rule 52(a) F.R.Civ. P. governs in considering the merits of Williams' appeal from the district court's finding that he was contributorily negligent. While his argument focuses upon events leading up to the accident, we feel that solution of this problem is inseparably linked to the issue of Terry's alleged negligence discussed above.

The district judge stated that Williams employed the most dangerous of several alternative methods for untangling the line from the cathead. This appears from study of his memorandum-opinion to be the sole undergirding for reducing the final award by 40%. As noted above, the opinion stressed that instead of using his hands, he could have pried the line loose with a Stillson wrench or crowbar, or he could have cut the line anywhere above the cathead. Williams attacks this, arguing: (1) that the alternative methods were either drastically impractical or not necessarily safer; (2) that a finding of contributory negligence cannot stand when there was a lack of proximate cause due to the intervening, unforeseeable negligence of Terry; and (3) that the district court erred in not relating how it computed the figure of 40% for reducing the final award.

The lower court did not find Williams contributorily negligent because he gave an order to turn on the power while untangling the line with his hands, but appeared rather to rely entirely on the use by Williams of his hands when other methods were available. We do not doubt that if Williams in fact ordered the power turned on, it was negligence on his part to do so when one or both of his hands were entangled in the whipline around the cathead. The difficulty arises when we assume the opposite, that he did not give the order. We proceed to an analysis of each of Williams' claims utilizing that assumption.

The first question is whether Williams' use of his hands, was contributory negligence in and of itself. The suggested alternative of cutting the line is frail indeed. According to the testimony, lines frequently tangle on catheads, and to cut one each and every time seems both

impractical and demonstrative of an extraordinary rather than an ordinary and usual standard of care. But the use of a crowbar or Stillson wrench may have been a practical, viable, and safer option under the circumstances. This point seems to us so close as to require that we defer to the judgment of the trial court as not clearly erroneous.

Williams' second argument poses a more difficult question: assuming that Terry acted without an order from Williams, was his action intervening unforeseeable negligence, depriving Williams' contributory negligence of proximate causation with respect to his injury? As to this point we find Williams' argument persuasive.

While the hornbook rule advanced by Williams with respect to intervening negligence needs no citation, it is likewise not without exception: "It is not always necessary, however, to find intervening conduct specifically foreseeable. Courts have held tortfeasors responsible when their conduct threatens a particular sort of result and an unanticipated force intervenes to produce that result." Watz v. Zapata Off-Shore Co., 5 Cir. 1970, 431 F.2d 100, 116. In *Watz* a chain manufacturer sold a chain in which a link had been negligently fused and was thereby rendered weaker than it should have been. Despite negligent use by the purchaser, the damage that resulted when the link failed was found to be proximately caused by the negligent fusion of the link.

We recognize the difficulties inherent in drawing fine lines between foreseeable negligence and contributory negligence, but conclude that Williams' situation differs from that which obtained in *Watz* to the extent that *Watz* is not controlling here. The focus in *Watz* was upon the threat posed by selling a chain with a defective link. The

danger was that it might fail even when used in lifting loads within its stated capacity. While abuse of the chain was not specifically foreseeable, the chain manufacturer's negligence threatened a particular sort of result, i.e. the breaking of the chain. But the same observation does not fit Williams' conduct, which did not threaten any sort of result, save the untangling of the line, until the completely unforseeable intervention of Terry's (assumed) negligence. On remand, should the district court find that Terry was not acting under Williams' order, it should conclude that Williams' negligence was not a contributing proximate cause of his injury.

We need spend a little time with Williams' assertion of error in the trial court's failure to state the underpinning for its 40% reduction of the amount of his award because of contributory negligence. This feature of the decision below falls with our reversal for further findings as to Brasea's (and Terry's) negligence and Williams' contributory negligence. If upon remand Williams is again found contributorily negligent, the percentage reduction of his award should be related to the evidence by an appropriate finding.

This analysis disposes of the most significant aspect of both Williams' and Brasea's appeals, but several other issues are raised and require consideration. Williams also attacks the trial court's modification of final judgment by which the originally found joint and several liability of the defendants was changed to primary-secondary. This was done by applying the divided damages rule, limited to maritime law, under which each tortfeasor is assessed primary liability for only his proportionate share, in this case one-third, and secondary liability as to the remainder.

See, e.g., Crain Bros., Inc. v. Wieman & Ward Co., 3 Cir. 1955, 223 F.2d 256. Williams argues that the divided damages rule is limited to collision cases and was thus improperly applied below in this case. The Supreme Court has recently ruled otherwise in Cooper Stevedoring Co., Inc. v. Fritz Kopke, Inc., et al., 1974, ____U.S.____, 94 S.Ct. 2174, 40 L.Ed.2d____ [decided May 28, 1974] where this Court's award of contribution between joint tortfeasors in a noncollision maritime case, 5 Cir., 479 F.2d 1041, was affirmed as proper under the circumstances. Cf. also Empire Seafoods v. Anderson, et al., 5 Cir. 1968, 398 F.2d 204. We determine, infra, that Bender and CMC are not liable in damages, so that the applicability of the divided damages rule need not be answered here.

Williams argues also that it was improper to reduce his judgment by 40% under the comparative negligence doctrine of maritime law as against Bender and CMC, who were found liable under a products liability theory. The argument is that since strict liability under Sec. 402A of the Restatement is not barred by contributory negligence, that negligence should not be used to effect a percentage reduction of an award premised upon a violation of that section. We recognize at least arguable merit in Williams' position, but resolution of the issue must await an appropriate case, since this point also is moot in light of our reversal of the trial court's finding of liability on the part of Bender and CMC.

Finally, Williams alleges that the district court erred by failing to enter judgment *in rem* against CIAPESC I despite the fact that the vessel was found to be unseaworthy. The point is well taken. The lower court specifically found the CIAPESC I unseaworthy, App. at 1754,

and that finding is not challenged on appeal by Brasea either on brief or at oral argument. The district court on remand should make the appropriate modification of its final order.

III. BRASEA'S CROSS-APPEAL

Brasea's liability was grounded upon both the negligence of Terry, under the doctrine of *respondeat superior,* and the unseaworthiness of the CIAPESC I. On cross-appeal Brasea asserts error with respect to the lower court's finding of negligence by Terry and its denial of indemnity as against Bender and CMC. We have already dealt with the interrelated negligence issues, and ordered a remand on the subject. We turn our attention to the indemnity issues.

There is more than one string to Brasea's indemnity bow, and we will summarize each briefly. First it is argued that the indemnity principles of *Ryan*[2] should be applied in this case. *Ryan* established the now familiar doctrine that a stevedoring contractor's agreement to perform all of a shipowner's stevedoring operations necessarily includes the consensual implied obligation to stow cargo properly and safely, (now usually referred to in the cases as WWLP, or warranty of workmanlike performance), and affirmed the Second Circuit's award to the shipowner of indemnity against the stevedoring company for the amount recovered by one of the contractor's longshoremen employees for injuries sustained while unloading a ship due to improper stowage, and held that shipowner's fail-

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2. Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp., 1956, 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133.

ure to discover and correct contractor's own breach of contract could not excuse such breach. The exclusiveness of liability provision of the Longshoremen's and Harbor-workers' Compensation Act, Sec. 5, 33 U.S.C. Sec. 905 was held by the Court to be no bar to the indemnity claim.

The inappositeness of *Ryan* to the present case is apparent. Naturally, if on remand Terry (and hence Brasea) is found to have been negligent, then the sole cause of Brasea's liability will not be the conduct of either Bender or CMC. The analogy fails for added reasons. *Ryan* was limited to a situation of contract breach, but no such obligation existed here. Most importantly, the stevedore in *Ryan* was found negligent. Bender and CMC were expressly found not to have been negligent, and we reverse, as will be seen below, Parts IV and V, the strict liability judgment. Nothing is left upon which Brasea can base an argument for indemnity flowing from contractual or quasi-contractual breach.

Brasea's second theory comes closer to the mark, but is still unavailing. The argument seeks to apply here the indemnity principles we employed in Tri-State Oil Tool Industries, Inc. v. Delta Marine Drilling Co., 5 Cir. 1969, 410 F.2d 178. In *Tri-State* indemnity was based upon a major-minor/active-passive tort theory, as opposed to the contractual theory of *Ryan*. A member of a drilling crew on board a submersible barge was injured as a result of defective equipment which had been furnished by Tri-State. Delta Drilling, whose sole liability was due to unseaworthiness because of the defective equipment, was held indemnified as the passive tortfeasor by Tri-State, whose active negligence brought about the condition of unseaworthiness.

Again, assuming that Terry is not found negligent on remand,[3] the argument still must fail. Even if Bender and CMC were liable in products liability, that is simply another form of passive tort, analogous to unseaworthiness. Thus the parties would have been in pari delicto, as the district court found. But here again, our reversal on the strict liability, Parts IV and V, leaves Bender and CMC without any, much less passive, tort liability.

Apparently anticipating the fundamental flaw in its indemnity arguments, Brasea goes on to urge that the lower court erred in finding that Bender and CMC were not negligent. While Brasea may have thought that success here would cure the defect in its indemnity theory, our discussion of that issue amply demonstrates that the claim fails, regardless. But since we reverse on the products liability issue, it is appropriate for us to address the question of possible negligence in order to determine if Bender and CMC should sustain any liability whatever in this action.

Here again we are guided by F.R.Civ.P. 52(a), and may overturn only a finding of fact which we determine to be clearly erroneous. The district court discussed the roles of Bender and CMC in the litigation, then specifically found that neither had been negligent. We find substantial evidence to support that conclusion and approve it as correct.

Two allegations with respect to CMC's negligence were considered by the lower court. First, there was a question

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3. If Terry were to be found negligent, Brasea could not possibly be a "passive" tortfeasor. Contrary to its assertion to that effect on brief, vicarious liability through the doctrine of respondeat superior is not functionally equivalent to "passive" negligence. See Barrios v. Louisiana Construction Materials Co., 5 Cir. 1972, 465 F.2d 1157.

to resolve as to whether the machined taper on the cathead would increase the likelihood of lines tangling. The district court found scant evidence for such a conclusion, after hearing from CMC engineer Koloc, who was called as an adverse witness by Williams. App. at 1748. We see no more evidence to support the allegation than did the lower court, and cannot label as erroneous its conclusion of a failure to carry the burden of proof.

The failure of CMC to install a braking mechanism on the winch-cathead assembly was the second factor considered below. In essence, the district court concluded that it was feasible to install a brake and that its absence rendered the winch defective and unreasonably dangerous to users. However, the court also found that this did not constitute the exercise of less than the ordinary standard of care, and that no fault was attributable to CMC. App. at 1752. Support for the latter conclusion was based in part upon testimony that winches, and especially winches on shrimp boats, are practically never equipped with braking devices. CMC cannot be held to have failed to exercise ordinary care by the manufacture of a winch capable of producing injury only when used in such unusual situations as the one involved here. CMC was not shown to have departed from the required standard of care in its design, engineering and manufacture of the winch.

Brasea raises nothing to refute these conclusions. Rather, it points to the testimony of CMC engineer Koloc as proof that the winch was not properly tested prior to sale. That theory also was expressly rejected by the lower court, after consideration was given to all the relevant evidence on the point. App. at 1748. The record supports

that conclusion and we discern nothing which would require reversal in this regard under the clearly erroneous standard.

The strict liability of Bender was based upon the manner in which it positioned the snatch-block frame above the cathead. This is the pulley device through which the whipline runs from the shrimp net to the cathead. Bender's error was found to be in positioning the block too far forward, thus depriving the line of a "fair lead," which refers to the angle at which a line runs from the block to the cathead. App. at 1750. This situation increases the probability of lines tangling, and a tangled line was the first in a chain of events leading to Williams' injury.

Brasea argues that this defect in positioning, together with the fact that the block was not tested *under strain,* requires a finding of negligence. But testing the line under strain would have revealed nothing germane to the fair lead problem; the court's finding related rather to *positioning*. Additionally, the testimony of Thomas Bender was persuasive that his company did in fact exercise care in installation, despite the slightly improper location of the block and hanger frame.

Finally, Brasea postulates that CMC should be required to pay 90% of whatever damages are ultimately awarded. The theory is that but for the lack of a brake on the winch, Williams would have sustained relatively minor injury to his left hand, which was caught when he first yelled for the power to be cut. Medical testimony was introduced to the effect that had Williams only suffered this injury to his left hand he would still have been able to resume 90% of his normal daily activities after the accident. From this it is argued that CMC's failure

to provide a brake produced 90% of Williams' full disability, and that it should therefore contribute a similar proportion to his monetary recovery. Authority for the argument advanced is asserted to be found in Horton & Horton, Inc. v. T/S J. E. Dyer, 5 Cir. 1970, 428 F.2d 1131. We acknowledge the novelty of the argument, but do not pass upon its merits or the possible application of *Horton*. Again, our resolution, infra Part V, of the negligence and products liability issues in CMC's favor moots the discussion and its decision.

IV. CROSS-APPEAL BY BENDER

At the outset we are met with Bender's claim that the trial court lacked jurisdiction over it. Jurisdiction over Bender, an Alabama corporation, was claimed under the Texas Long Arm Statute, Vernon's Tex.Rev.Civ.Stat.Ann., Art. 2031b (1959). The requisite activity within Texas for jurisdiction to attach is measured by the "minimum contacts" standard. We have earlier noted that "the Texas purpose [in enacting article 2031b] was to exploit to the maximum the fullest permissible reach under federal constitutional restraints." Atwood Hatcheries v. Heisdorf & Nelson Farms, 5 Cir. 1966, 357 F.2d 847, 852. Bender's motion to dismiss for lack of jurisdiction and to quash service addressed to the lower court, was denied by a well reasoned memorandum and order. Williams v. Brasea, Inc., S.D.Tex. 1970, 320 F.Supp. 658. For the reasons there well articulated we hold that the district court had personal jurisdiction over Bender, under the teachings of Hearne v. Dow-Badische Chemical Co., S.D.Tex.1963, 224 F.Supp. 90, applying International Shoe Co. v. State of Washington, 1945, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, to the Texas Statute, Article 2031b.

Before reaching the merits of the products liability issues in this case, we pause to comment upon the theoretical posture in which they arose. The incorporation of products liability law into general maritime law is of most recent vintage. District courts have divided on the propriety of such incorporation, and only one appellate court has passed judgment thus far on the issue (by approving the incorporation). Lindsay v. McDonnell Douglas Aircraft Corp., 8 Cir. 1972, 460 F.2d 631. We do not believe that a case such as this, which in our judgment fails to establish liability under the theory, presents the appropriate vehicle for consideration of whether that theory should be made part of the maritime law in this circuit. Thus we qualify our holding by saying that *even if* products liability law is to be incorporated into our general maritime law, there can be no liability under the facts of this case. The question of incorporation *vel non* is left open for decision at a later date when more guidelines may be available.

The district court relied upon the theory of strict liability set forth in the Restatement of Torts 2d, Sec. 402A, which provides, in pertinent part:

> "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, . . ."

As is evident from the language of the Restatement, three elements of proof must be present: (1) defective condition of the product; (2) unreasonable danger to the user; and (3) proximate cause of injury. Assuming *arguendo* that Bender's installation of the winch resulted

in a lack of fair lead which may be termed a defective condition, our judgment is that it was neither unreasonably dangerous nor a proximate cause of Williams' injuries.

The defect alleged was dangerous in that it increased the likelihood of lines tangling on the cathead. It is significant to note that it merely increased the likelihood of an event not at all uncommon on shrimp trawlers, i.e. lines tangling on a cathead. The district court in its Final Order expressly acknowledged this pre-existing likelihood. App. at 1747.

Assuming then that the tangling of lines is dangerous, the question then is whether a defect increasing the likelihood of that event makes it *unreasonably* dangerous. We find the answer in Sec. 402A com. i: "The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." We are unable to conclude that the tangling which led to Williams' injury was beyond the contemplation of seamen who had common knowledge that lines on shrimp boats frequently tangle. As a matter of elementary logic, such a conclusion would be a manifest *non sequitur*. We hold accordingly that the position of the snatch block frame was not unreasonably dangerous as a matter of law.

In the next place proximate cause is absent under the facts as given. To use common law terms for the moment, the requisite foreseeability was lacking; see Helene Curtis Industries, Inc. v. Pruitt, 5 Cir. 1967, 385 F.2d 841 (foreseeability as part of proximate cause considered in the field of products liability as to hair bleaching

products). If Williams ordered the power on, Bender can hardly be charged with anticipating his doing so while his hands were in the line around the cathead. Alternatively, if Terry acted without authority, neither should Bender be charged with foreseeing that he would do so while Williams had his hands in the line.

The comments to Sec. 402A support this conclusion in even more precise terms. If Williams ordered the power turned on, comment n would be applicable: "voluntarily and unreasonably proceeding to encounter a known danger, (which) commonly passes under the name of assumption of risk, is a defense under this Section as in other cases of strict liability." If Terry turned the power on without instruction from Williams, comment g would control: "The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful . . ." Lines tangle regardless of whether a fair lead problem may exist, but only Terry's mishandling of the product, assuming he acted without authority, produced the injury. Under either or any of the foregoing posited analyses, we hold that Bender could not be properly held liable in products liability.

V. CROSS-APPEAL BY CMC

The sole basis of liability arrived at by the trial court as to CMC was its failure to provide a braking mechanism on the winch it sold to Bender. All the crewmen knew it lacked a brake, and the evidence was clear that winches with brakes were almost non-existent on trawlers used by the shrimping industry.

Although the district court perceived this omission by CMC as an unreasonably dangerous defect, that charac-

terization is not, strictly speaking, permissible under these facts. According to the commentary, a defective condition obtains only when "the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, ..." Sec. 402A com. g. The winch was not "defective" because all involved knew that it lacked a brake. This case falls into the category of defective design, situations in which the "defect" is said to inhere in the design of the product, i.e. lack of a safety device. The "defect" issue is thus subsumed into a determination of whether that design, though known full well to the user, rendered the product unreasonably dangerous to him. See, for example, Ross v. Up-Right, Inc., 5 Cir. 1968, 402 F.2d 943; Wade, Strict Tort Liability of Manufacturers, 18 S.W.L.J. 5 (1965).

The question then arises whether the lack of a brake made the winch "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, ..." Sec. 402A com. i. This proposition carries its own answer. The danger posed by the lack of a brake could scarcely be beyond the contemplation of crewmen who knew of its absence and worked with the winch in that condition on a daily basis.

Our conclusion is further supported by the theoretical approach advocated by Wade, supra, and others in defective design cases. Unreasonable danger is assessed under a cost-benefit analysis of the proposed safety device. Paraphrasing the variables suggested by Dean Wade, 19 S.W.L.J. at 17, we find the following in support of a "cost outweighs benefit" conclusion here: (1) catheads are practically indispensable to the shrimping business; (2) few, if any, are equipped with a braking device; (3)

the likelihood of injury is remote, limited to peculiar circumstances such as occurred in this unusual case; (4) the inherent danger is obvious to all; (5) injury could have been avoided but for the misuse of the product; and (6) installation of a brake would substantially increase the cost of the winch.

When we come to the element of proximate cause, CMC occupies a position nearly identical to that of Bender. Depending on whether an order to turn on the power was given by Williams or not, either assumption of risk or unanticipated product misuse, as described in comments n and g, Sec. 402A, may properly be inferred. We further think it manifest that such action is not the foreseeable type of conduct which should give rise to a holding of strict liability against a manufacturer.

VI. CONCLUSION

Our holdings are summarized as follows: (1) the case is remanded for a factual finding as to whether Williams ordered Terry to engage the power; (2) the district court is ordered to assess liability *in rem* as to the vessel CIAPESC I; (3) the district court's dismissal of the indemnity claims is affirmed; (4) the district court's finding that Bender and CMC were not negligent is affirmed; (5) the district court's finding of product liability is reversed; (6) Bender and CMC are due to be dismissed as parties defendant.

Affirmed in part, reversed in part and remanded with directions.

APPENDIX D

Roy C. WILLIAMS,
Plaintiff-Appellant Cross Appellee,

v.

BRASEA, INC., and VESSEL CIAPESCA I, her engines, etc., Defendant-Appellee Cross Appellant,

Bender Welding & Machine Co., Inc.,
Defendant-Appellee Cross-Appellant,

Construction Machinery Company,
Defendant-Appellee Cross Appellant.

No. 72-3623.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

May 23, 1975.

Appeals from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING AND
PETITIONS FOR REHEARING EN BANC

(Opinion July 5, 1974, 5 Cir. 1974, 497 F.2d 67)

Before GEWIN, THORNBERRY and SIMPSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed on behalf of Roy C. Williams is denied and no member of this panel nor Judge in regular active service on the Court having requested

that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

The Petition for Rehearing filed on behalf of Brasea, Inc. is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

We have given thorough consideration to the petitions for rehearing and for rehearing en banc, as well as to the several briefs, including briefs by *amici curiae,* received in support of or in opposition thereto, before reaching our decision to deny the petitions.

We direct two slight changes in the panel opinion, Williams v. Brasea, Inc., 5 Cir. 1974, 497 F.2d 67.

Perceiving that our disposition of the cross-appeals (1) of Bender, Part IV of the panel opinion, 497 F.2d at 77-79, and (2) of CMC, Part V of the panel opinion, 497 F.2d at 79—holding that neither of said parties could be held liable under a theory of products liability—dissipated completely any basis for assessing damages *in rem* against the shrimp trawler CIAPESC I, we withdraw and recede from the following designated portions of the panel opinion:

(a) The statement appearing at page 75 of 497 F.2d:

> "Finally, Williams alleges that the district court erred by failing to enter judgment *in rem* against CIAPESC I despite the fact that the vessel was found to be unseaworthy. The point is well taken. The lower court specifically found the CIAPESC I

unseaworthy, App. at 1754, and that finding is not challenged on appeal by Brasea either on brief or at oral argument. The district court on remand should make the appropriate modification on its final order."

(b) That portion of the "VI CONCLUSION" section of the opinion, appearing at page 80 of 497 F.2d:

"(2) the district court is ordered to assess liability *in rem* as to the vessel CIAPESC I."

In lieu of (a) above the following language is substituted:

"Finally, Williams alleges that the district court erred by failing to enter judgment *in rem* against CIAPESC I despite the fact that the vessel was found to be unseaworthy. The point would be well taken if the underpinning for the finding of unseaworthiness was sustained against the cross-appeals of Bender and CMC, either or both. The basis for the unseaworthiness finding by the district court was in fact its findings[1] that Bender and CMC provided

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1. "Therefore, the Court finds that the failure on the part of CMC to provide an adequate braking mechanism for the port cathead rendered the same defective and unreasonably dangerous to persons situated as was plaintiff, and, therefore, it was not reasonably suited for the purpose for which it was intended; and, further, that the absence of an adequate brake was a producing cause of injuries to plaintiff." (App. p. 1750)

"Therefore, the Court finds the placement of the snatch-block frame by Bender was such as to make the vessel, and particularly the area in front of and near the winch, unreasonably dangerous to users thereof, and thus it was not reasonably suited for the purpose for which it was intended; and such installation was a producing cause of the incident in which plaintiff was seriously injured." (App. p. 1751)

"Bender installed on the vessel, engine and power take off equipment which operated the winch, constructed a snatch-block frame

> the vessel CIAPESC I with equipment which was 'unreasonably dangerous', 'defective' and 'not reasonably suited for the purpose for which it was intended.' The district court's opinion further held 'The faults of Bender and CMC, as heretofore outlined, are the same faults which caused Defendant, Brasea, Inc., to afford to Plaintiff an unseaworthy vessel.' (App. p. 1760)
>
> "Our disposition reversing the district court as to the cross-appeals of Bender and CMC, Parts IV and V of this opinion, *infra,* eliminates any basis for holding CIAPESC I liable *in rem.* The point is rendered moot."

With respect to (b) above the remaining numbered portions under "VI CONCLUSION" of the opinion, i. e. (3), (4), (5) and (6) are renumbered respectively (2), (3), (4) and (5).

The costs of this appeal are directed to be assessed one-half against the plaintiff-appellant-cross-appellee, Roy C. Williams, and one-half against the defendant-appellee-cross-appellant, Brasea, Inc.

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which was above the winch and installed a rod with a handle on it which was part of the engine and power take off equipment." (App. p. 1744)

"No substantial change had occurred or modifications made in said winch, the port cathead, or the machinery related to the operation of the cathead, or in the snatch-block frame from the date of delivery of the vessel to Brasea until the time plaintiff suffered said injuries." (App. p. 1745).

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

October Term, 1973

NO. 72-3623

D. C. Docket No. CA 69-C-213
ROY C. WILLIAMS,
Plaintiff-Appellant-Cross Appellee,

v.

BRASEA, INC. and VESSEL CIAPESCA I,
her engines, etc., Defendants-Appellees-Cross Appellants,

BENDER WELDING & MACHINE CO., INC.,
Defendant-Appellee-Cross Appellant,

CONSTRUCTION MACHINERY COMPANY,
Defendant-Appellee-Cross Appellant.

Appeal from the United States District Court
for the Southern District of Texas

Before GEWIN, THORNBERRY and SIMPSON,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court with directions in accordance with the opinion of this Court.

It is further ordered that costs be assessed one-half against the plaintiff-appellant-cross-appellee, Roy C. Williams, and one-half against the defendant-appellee-cross-appellant, Brasea, Inc., by the Clerk of this Court.

July 5, 1974

Issued as Mandate: